Filed 12/8/03 L. Johnson, Inc. v. America West Airlines CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

L. JOHNSON, INC.,	
Plaintiff and Appellant,	E031821
v.	(Super.Ct.No. RCV 31986)
AMERICA WEST AIRLINES, INC.,	O P I N I O N
Defendant and Respondent.	

APPEAL from the Superior Court of San Bernardino County. Ben T. Kayashima, Judge. (Retired Judge of the Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Guerin & Guerin, John Guerin, Regis A. Guerin and Sharon Barnes for Plaintiff and Appellant.

O'Melveny & Myers, Robert A. Siegel, Jeffrey A. Wortman and Rochelle R. Dunham for Defendant and Respondent.

Plaintiff and appellant L. Johnson Inc., dba Premier Services (Premier) appeals a judgment entered in favor of defendant and respondent America West Airlines, Inc.

(America West) after the trial court granted America West's motion for summary judgment. We shall affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

I. Factual Background

L. Johnson, Inc., dba Premier Services, was incorporated in June of 1997, with Purcell and Lavern Johnson as the company's only principals. Premier began doing business in the 1980's as a sole proprietorship under the name "Premier Maintenance," and was previously incorporated in 1994 under the name "Premier P., Inc." For purposes of this appeal, Premier's business will be referred to simply as Premier.

During the 1990's, several airlines at Ontario Airport hired Premier to provide airport services -- janitorial, baggage delivery, positive claims, aircraft cleaning and skycap. With a few exceptions, these services were provided on a "fee-for-service" basis because there were no durational or exclusive terms for the provision of these services. Services are referred to as fee-for-service where the service is provided and invoiced, but there is no contractual arrangement containing durational terms. The airlines could, and sometimes did, choose to cease using Premier's services as they wished.

In 1998, a new terminal was opening at Ontario Airport, and several vendors, including Sierra Aviation, Inc. (Sierra) and Premier, submitted bids to the station managers of the airlines for the provision of janitorial services to all of the airlines at the airport. Sierra is one of Premier's competitors in the airlines service industry, and is owned and operated by James Mog, a former America West station manager. Following

a review of the bids submitted, the airlines at Ontario Airport selected Sierra for the provision of janitorial services at the new terminal.

As a result, Premier contends that America West breached its alleged obligation to use Premier's services, and induced Southwest Airlines (Southwest) and Alaska Airlines (Alaska) to breach their alleged obligations to use Premier's services or interfered in some way with the alleged contractual relations between Premier, Southwest and Alaska.

A. Premier's Business Relationship With America West

Premier's business relationship with America West at Ontario Airport began in approximately 1993, when Premier began providing baggage delivery and janitorial services for America West. These services were provided on a fee-for-service basis because there were no durational terms for the provision of these services, and no written or oral durational contract terms were ever agreed upon by the parties.

B. Premier's Business Relationship With Alaska

Premier provided baggage delivery and janitorial services for Alaska during the early 1990's. Premier provided these services on a fee-for-service basis because there were no durational terms for the provision of these services, and no written or oral durational contract terms were ever agreed upon by the parties.

C. Premier's Business Relationship With Southwest

1. Southwest Janitorial Contract

On August 1, 1991, Southwest and Premier executed a one-year written contract for the provision of janitorial services, "renewable upon the completion of one year with the express written agreement of both parties." This contract was never renewed.

Nevertheless, Southwest continued to use Premier's janitorial services on a fee-for-service basis until September 5, 1998. Lavern Johnson testified that if Southwest decided "they just didn't want to do business with [Premier] that they could at any time cease to use [Premier's] janitorial services" and that Southwest had no "obligation to continue to use [Premier's] janitorial services."

2. Southwest Positive Claim Contract

Premier and Southwest had a written contract for positive claim services, dated April 16, 1995. The agreement was to "continue indefinitely unless either party [gave] the other party advance written notice of termination at least thirty (30) days prior to the effective termination date." Southwest gave Premier sufficient notice of cancellation of the positve claim agreement.

3. Southwest Fee-For-Service Arrangements With Premier

Premier had no contract with Southwest for the provision of aircraft cleaning and/or baggage delivery. Instead, these services were provided by Premier on a fee-for-service basis. The Johnsons admitted that they did not expect to provide these services in perpetuity, that the provision of these services was not governed by any durational terms,

and that Premier understood that Southwest could terminate the relationship with or without "good cause." Premier could provide no evidence that Premier's cleaning arrangement was exclusive, how long it would last, or how it could be terminated.

In August of 1998, Southwest gave Premier a courtesy 30-day notice that its aircraft cleaning service would be terminated. A few days later, Southwest received an "irregularity report" stating that the cockpit gauges and instruments had been tampered with on an aircraft that Premier had cleaned. Thereafter, Southwest terminated Premier's services immediately. The Johnsons admitted that there were no contractual provisions that would have prevented Southwest from terminating the aircraft cleaning arrangement at any time.

II. Procedural History

On July 21, 1999, Premier filed a complaint against America West, Southwest, Alaska, current and former employees of these airlines, and Sierra, one of Premier's competitors in the airline service industry. The complaint alleged 47 causes of action for unfair business practices, breach of contract, breach of covenant of good faith and fair dealing, inducement of breach of contract, intentional interference with contractual relationship, negligent interference with contractual relationship, and conspiracy.

On October 12, 2001, America West filed a motion for summary judgment. The hearing on the motion was heard and January 10, 2002, and the trial court granted the motion in favor of America West. The trial court entered judgment in favor of America West on March 29, 2002.

ANALYSIS

I. The Trial Court Properly Granted America West's Motion for Summary Judgment

Premier alleged 23 causes of action against America West -- causes of action 10 through 13, 19-22, 25-30, 33-34, 37-40, 43-44, and 47. Premier contends that the trial court erred in granting America West's motion for summary judgment as to all 23 causes of action.

A. Standard of Review

In reviewing a motion for summary judgment, "'[t]his court exercises its independent judgment as to the legal effect of the undisputed facts disclosed by the parties' papers. [Citations.] In so doing, we apply the same three-step analysis required of the trial court: We first identify the issues framed by the pleadings, since it is these allegations to which the motion must respond. Secondly, we determine whether the moving party has established facts which negate the opponents' claim and justify a judgment in the movant's favor. Finally, if the summary judgment motion prima facie justifies a judgment, we determine whether the opposition demonstrates the existence of a triable, material factual issue. [Citation.]' [Citation.]"[1]

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[1] *Aetna Health Plans of Cal., Inc. v. Yucaipa-Calimesa Joint Unified School Dist.* (1999) 72 Cal.App.4th 1175, 1186.

B. Causes of Action 10-13

1. Step I -- Issues Framed by the Pleadings

Causes of action 10-13 allege breach of contract and breach of the covenant of good faith and fair dealing with respect to Premier's provision of janitorial services and baggage delivery services to America West.

"A cause of action for damages for breach of contract is comprised of the following elements: (1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff. [Citation.]"[2] To establish a cause of action for breach of the implied covenant of good faith and fair dealing, a plaintiff must establish that a defendant deprived the plaintiff of the benefits of its contract or that the defendant interfered with or failed to cooperate with the plaintiff in performing the contract.[3] According to "simple and unassailable contract law principles," "the implied covenant of good faith and fair dealing rests upon the existence of some specific contractual obligation."[4] "There is no obligation to deal fairly or in good faith absent an existing contract."[5]

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[2] *Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1388.

[3] See *Sutherland v. Barclays American/Mortgage Corp.* (1997) 53 Cal.App.4th 299, 314.

[4] *Racine & Laramie, Ltd. v. Department of Parks and Recreation* (1992) 11 Cal.App.4th 1026, 1031-1032 (*Racine*), citing *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 683-685, 689-690.

[5] *Racine*, *supra*, 11 Cal.App.4th 1026, 1032, citing *Hess v. Transamerican Occidental Life Ins. Co.* (1987) 190 Cal.App.3d 941.

In sum, an essential element to both the breach of contract and breach of the covenant of good faith and fair dealing causes of action is the existence of a valid contract between Premier and America West for the provision of janitorial and baggage delivery services.

2. Step II -- America West's Factual Showing Justified Judgment in Its Favor

In its moving papers, America West established that America West could terminate Premier's services with or without cause, and that no contract with any durational term was breached or could have been breached -- through the deposition testimony of Purcell and Lavern Johnson, the only two principals of Premier.

In his deposition testimony, when Purcell Johnson was asked whether Premier had a contract with America West Airlines regarding the provision of baggage delivery services, he responded: "I don't believe - - we didn't have a written contract." When asked whether Premier had "some kind of oral agreement with America West Airlines regarding the provision of baggage delivery services," Purcell Johnson responded, "No agreement. [¶] . . . [¶] We didn't discuss any agreement of when it's going to end or how long it's going to go on or anything like that." In fact, Purcell Johnson testified that he believed that America West could stop using Premier's services for baggage delivery at any time that it chose to do so. Moreover, Purcell Johnson admitted that America West never agreed to continue Premier's services as long as the service was "good or excellent."

Lavern Johnson's testimony was consistent with the testimony of Purcell Johnson. She stated that it was her understanding that if America West was dissatisfied with the baggage delivery services provided by Premier, America West could terminate their agreement at any time. Moreover, Lavern Johnson admitted that, in fact, America West did not have to have any reason to terminate their agreement with Premier. She went on to state that she was not aware of any facts showing that America West had an obligation to continue baggage delivery services with Premier.

Furthermore, Lavern Johnson testified as to the janitorial services provided by Premier to America West. Lavern Johnson testified that she believed that Premier provided janitorial services for America West, but that she was unaware of the terms of any agreement between Premier and America West. For example, she testified that she did not know "if there was any provision regarding the termination of that agreement." Lavern Johnson, however, did admit that there was no understanding "that the janitorial services agreement that [Premier] had with America West Airlines would continue in perpetuity." In fact, Lavern Johnson agreed "that even if America West was not dissatisfied with those janitorial services, they could terminate [Premier's] agreement with them at any time."

3. Step III -- Premier's Opposition Failed to Demonstrate the Existence of Any Triable Issues of Fact

In its opposition to the motion for summary judgment, Premier failed to demonstrate the existence of any triable issues of fact. Although Premier's opposition

and briefs filed on appeal are difficult to comprehend, we will attempt to decipher the arguments raised by Premier.

First, Premier argued that, although fee-for-service contracts are "usually isolated, sporadic and incidental," Premier and America West had "continuous conduct by each party which accented to establish an oral contract as customarily to the industry." Thereafter, Premier stated that it "*can provide* evidence to show that between 1993 and 1998 Premier provided baggage delivery and janitorial services for America West with copies of paid invoices submitted to America West by Premier Services to prove that an implied-in-fact contract was established between the parties based on the continued conduct of the parties." (Italics added.) What is absent in the opposition is any evidence of this implied-in-fact contract. Premier cannot simply state that it "can provide evidence." Instead, it was essential for Premier to provide evidence to dispute America West's evidence. It failed to do so.

Nevertheless, even if these documents -- invoices and payments -- were properly presented by Premier, such documents do not establish any agreement between the parties regarding duration terms or promises not to terminate the provision of services without cause. Instead, all these documents would show is that the parties had a fee-for-service relationship.

In its opposition, Premier also argued that the lack of express durational terms does not invalidate the existence of a contract -- that the term of duration can be implied from the nature of the contract and circumstances surrounding it. Although this

pronouncement of the law may be correct, Premier fails to provide any evidence of the "implied" term of duration of any oral contract between Premier and America West. In fact, as discussed above, both Purcell and Lavern Johnson testified that the parties never discussed "when [the contract's] going to end or how long it's going to go on or anything like that." In fact, Purcell Johnson testified that he believed that America West could stop using Premier's services for baggage delivery at any time that it chose. Likewise, Lavern Johnson testified "that even if America West was not dissatisfied with those janitorial services, they could terminate [Premier's] agreement with them at any time."

For the first time on appeal, it appears -- although not clearly -- that Premier is arguing that Premier was an employee of America West. Hence, Premier argues that as an employee, "the rendering of services over a period of time, and acceptance of said services, supports the implication of promise to refrain from arbitrary dismissal. [Citations.]" We need not consider this new argument: "Generally, the rules relating to the scope of appellate review apply to appellate review of summary judgments. [Citation.] An argument or theory will generally not be considered if it is raised for the first time on appeal."[6]

Moreover, in its opening brief, Premier spends a great deal of time attempting to attack the deposition testimony of its own principals -- Purcell and Lavern Johnson. These evidentiary objections, however, were not raised below. Hence, they have been

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[6] *American Continental Ins. Co. v. C & Z Timber Co*. (1987) 195 Cal.App.3d 1271, 1281.

waived. Likewise, for the first time in its reply brief on appeal, Premier argues that America West cannot rely on the admissions by Purcell and Lavern Johnson because they "are not parties to this action!" We need not address this argument because Premier failed to raise this objection to the evidence in both the trial court and in its opening brief. Therefore, Premier has waived this argument also.

Therefore, we hold that America West did not breach any contractual agreement with Premier because the parties did not agree to any durational terms that could have been breached, and there is no basis for implication of any such terms. The trial court properly granted summary judgment as to causes of action 10 through 13.

C. Causes of Action 19-22 , 25-26, 33-34, and 37-40

1. Step I -- Issues Framed by the Pleadings

a. Causes of Action for Inducement of Breach of Contract

Causes of action 19-22 allege that America West induced Southwest to breach its contracts with Premier for the provision of janitorial aircraft cleaning, baggage delivery and positive claims services.

Causes of action 25-26 allege that America West induced Alaska to breach its contracts with Premier for the provision of janitorial and baggage delivery services.

In order to maintain a cause of action for inducing a breach of contract, the plaintiff must show that: (1) There was a valid and existing contract with a third party; (2) defendant had knowledge of this contract and intended to induce its breach; (3) the contract was in fact breached by the contracting party; (4) the breach was caused by the

defendant's unjustified or wrongful conduct; and (5) the breach and the resulting injury were proximately caused by the defendant's unjustified or wrongful conduct.[7]

b. Causes of Action for Intentional Interference with Contractual Relations

Causes of action 27-30 allege that America West intentionally interfered with contractual relations between Premier and Southwest for the provision of janitorial, positive claims, baggage delivery and aircraft cleaning services.

Causes of action 33 and 34 allege that America West intentionally interfered with contractual relations between Premier and Alaska for the provision of janitorial and baggage delivery services.

In order to maintain a cause of action for intentional interference with contractual relations, the plaintiff must show: (1) a valid and existing contract between the plaintiff and a third party; (2) the defendant's knowledge of this contract; (3) the defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual interference of disruption of the contractual relationship; and (5) resulting damage.[8]

The first element to the causes of action for inducing a breach of contract and the causes of action for intentional interference with contractual relations is the same -- Premier must have had a contract containing durational terms with Southwest or Alaska.

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[7] *Freed v. Manchester Service Inc.* (1958) 165 Cal.App.2d 186, 189; see also *Dryden v. Tri-Valley Growers* (1977) 65 Cal.App.3d 990.

[8] *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26.

2. Step II -- America West's Factual Showing Justified Judgment in Its Favor

In its moving papers, America West provided factual evidence that Premier had no contract containing durational terms with Southwest or Alaska -- the first element to the causes of action for inducing a breach of contract.

With regard to Southwest, Purcell Johnson testified that Premier "had some agreement with Southwest Airlines" to provide janitorial services. Purcell Johnson admitted that they never negotiated how long that agreement would last. In fact, Purcell Johnson stated that Premier did not "have any terms" with Southwest. In explaining what "terms" meant, it was clarified that no termination date for the agreement was agreed to between Premier or Southwest. Hence, Purcell Johnson understood that either party could end the agreement whenever it wanted to.

Lavern Johnson's testimony was similar to the testimony of Purcell Johnson. She testified that Southwest could have terminated its janitorial services contract with Premier at any time.

With regard to Alaska, Purcell Johnson testified that Premier agreed to provide Alaska with janitorial services three times a week, and that Alaska could terminate its relationship with Premier at any time. Purcell Johnson admitted that he had no reason to believe that Alaska had breached its contract with Premier. Purcell Johnson also testified that Premier did not have an agreement to provide baggage delivery service for Alaska. Premier, however, did provide baggage delivery service for Alaska with the understanding that Alaska could cease using Premier at any time it wanted to.

3. Step III -- Premier's Opposition Failed to Demonstrate the Existence of Any Triable Issues of Fact

In its opposition to the motion for summary judgment, Premier failed to demonstrate the existence of any triable issue of fact with regard to the first element of the causes of action for inducing a breach of contract between Premier and Alaska, and Premier and Southwest.

With regard to the contract between Alaska and Premier, Premier stated only that, "Premier *can provide* evidence to show that during the 1990's Premier provided baggage delivery and janitorial services for Alaska with copies of paid invoices submitted to Alaska by Premier to prove that an implied-in-fact contract was established between the parties based on their continued conduct." (Italics added.)

Premier's response is inadequate. As discussed above, Premier needed to provide the necessary evidence to refute America West's showing. What Premier "can provide," but failed to provide, does nothing to help Premier. Moreover, even if such paid invoices were provided or properly referenced, such documents would fail to establish any agreement between the parties regarding durational terms or promises not to terminate the provision of services without cause. Instead, all these documents would show is that the parties had a fee-for-service relationship.

With regard to the contract between Southwest and Premier, Premier seemed to acknowledge that the written contract it had with Southwest for janitorial services, dated August 1, 1991, was for a durational period of one year. Hence, the written contract

would have terminated in August of 1992, by its own terms. However, because Southwest continued to use Premier's services until September of 1998, Premier argued that "[t]his conduct between the parties created a new, implied in-fact contract, on a month-to-month basis, thereby establishing a continued business relationship with Premier from August 1, 1992 to and including September 5, 1998, when Southwest breached the contract." Even if we were to accept Premier's argument, without any citation to authority or evidence, Premier agrees that any contract it had with Southwest had a "month-to-month" term. And, in this case, Premier even admits that "the thirty (30) [day] notice that Southwest tendered to Premier[] was within the time period outlined in the agreement." Nevertheless, Premier attempts to defeat the motion for summary judgment by arguing that the termination notice was unlawful because it was given in "bad faith." What Premier fails to refute, however, is the testimony of Premier's own principals, who stated that Southwest could terminate its contract with Premier for any or no apparent reason.

Moreover, as America West points out, on March 19, 2002, the trial court granted the Southwest defendants' motions for summary judgment in their entirety, "and thus Plaintiff's entire case against the Southwest Defendants [was] disposed of." The court thereby ordered that judgment be awarded as follows: "Plaintiff Premier Services shall take nothing and Defendants Southwest Airlines Co. . . . shall recover from Plaintiff costs of suit herein." Premier has not appealed the judgment in favor of Southwest and against

Premier. Summary judgment against a party becomes final upon the losing party's abandonment of appeal.[9]

We hereby take judicial notice of the judgment in favor of the Southwest defendants. Evidence Code section 459 allows us to take judicial notice of any matter specified in Evidence Code section 452. Subdivision (d) of section 452 references "[r]ecords of . . . any court of this state . . . ."

In this case, the following causes of action alleged by Premier against the Southwest defendants were summarily adjudicated in favor of the Southwest defendants: (1) cause of action 3 (breach of contract against Southwest regarding Premier's provision of janitorial services to Southwest); (2) cause of action 6 (breach of contract against Southwest regarding Premier's provision of aircraft cleaning services to Southwest); and (3) cause of action 8 (breach of contract against Southwest regarding Premier's provision of baggage delivery services to Southwest). In ruling on the Southwest defendants' motion for summary judgment, the trial court noted that it had reviewed the alleged "contracts" and interpreted them. The trial court noted that the Southwest defendants "did everything correctly." Moreover, in ruling on causes of action 4, 5, 7 and 9 (breach of covenant of good faith and fair dealing), the trial court noted that the covenant of good faith and fair dealing "may not be read to prohibit a party from doing that which is expressly permitted by an agreement." The trial court stated that the alleged contracts at

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[9] *White Motor Corp. v. Teresinski* (1989) 214 Cal.App.3d 754, 762, citing *Columbus Line, Inc. v. Gray Line Sight-Seeing Companies Associated, Inc.* (1981) 120

[footnote continued on next page]

issue "were terminable at any time," and that proper notice was given with respect to the one "written contract."

As a result of the final ruling against Southwest in this case, Premier is precluded from arguing that America West induced a breach of contract or interfered in any manner with Premier's relationship with Southwest. Therefore, the trial court's granting of America West's summary judgment on causes of action 19-22, 27-30, and 37-40 was proper.

In sum, for the reasons set forth above, we hold that the trial court properly granted the motion for summary judgment as to causes of action 19-22 , 25-26, 33-34, and 37-40.

D. Causes of Action 37-40 and 43-44

1. Step I -- Issues Framed by the Pleadings

Causes of action 37-40 allege that America West negligently interfered with contractual relations between Premier and Southwest for the provision of janitorial, positive claims, baggage delivery and aircraft cleaning services.

Causes of action 43 and 44 allege that America West negligently interfered with contractual relations between Premier and Alaska for the provision of janitorial and baggage delivery services.

[footnote continued from previous page]
Cal.App.3d 622, 629.

2. Step II -- America West's Factual Showing Justified Judgment in Its Favor

The California Supreme Court has refused to recognize the tort of negligent interference with contractual relations because it would unnecessarily expand the liability for negligence.[10] Under the *Fifield* rule, unless a master/servant relationship exists, "the courts have consistently refused to recognize a cause of action based on negligent, as opposed to intentional, conduct which interferes with the performance of a contract between third parties or renders its performance more expensive or burdensome."[11] The *LiMandri* court noted that although a tort exists for negligent interference with *prospective economic advantage* under limited circumstances (i.e., when a duty is owed and damages are foreseeable), the California Supreme Court "has yet to disapprove [*Fifield*]."[12]

3. Step III -- Premier's Opposition Failed to Demonstrate the Existence of Any Triable Issues of Fact

In its opposition to the motion for summary judgment, Premier failed to address this legal argument. Instead, Premier focused on the actual actions by defendants that could possibly support these causes of action -- if they were legally viable.

On appeal, Premier argues that "[America West] is incorrect when it states there is no cause of action exists [*sic*] with respect to negligent interference." In support of this

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[10] *Fifield Manor v. Finston* (1960) 54 Cal.2d 632, 636 (*Fifield*).

[11] *LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 349 (*LiMandri*), citing *Fifield*, *supra*, 54 Cal.2d 632, 636.

[12] *LiMandri*, *supra*, 52 Cal.App.4th 326, 349.

argument, Premier cites to *J'Aire Corp v. Gregory*.[13] *J'Aire*, however, is inapplicable because it addressed the tort of negligent interference with *prospective economic advantage*, not negligent interference with contractual relations.[14] In this case, Premier alleged causes of action for negligent interference with contractual relations, and not interference with prospective economic advantage. Hence, *J'Aire* does not apply.

Therefore, we hold that the trial court properly granted America West's motion for summary judgment as to causes of action 37-40 and 43-44.

E. Cause of Action 47

Cause of action 47 alleges a conspiracy between all defendants to commit all causes of action alleged in the complaint.

A conspiracy alone is not actionable unless a civil wrong has been committed resulting in damage: "'The long-established rule that a conspiracy, in and of itself, however atrocious, does not give rise to a cause of action unless a civil wrong has been committed resulting in damage [citation omitted] requires a determination of whether the pleaded facts show something was done which, without the conspiracy, would give rise to a right of action.'"[15]

America West argued that, because none of the substantive causes of action was viable, the cause of action for conspiracy must also fail. In this opinion, we have affirmed the granting of the motion for summary judgment as to all the substantive

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[13] *J'Aire Corp. v. Gregory* (1979) 24 Cal.3d 799 (*J'Aire*).
[14] *J'Aire*, *supra*, 24 Cal.App.3d 799, 808.

causes of action. Hence, because there is no separate tort of civil conspiracy, the cause of action for conspiracy fails. The trial court properly granted summary judgment as to cause of action 47.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ Ward
J.

We concur:

/s/ McKinster
Acting P.J.

/s/ Richli
J.

[footnote continued from previous page]

15 *Tietz v. Los Angeles Unified Sch. Dist.* (1965) 238 Cal.App.2d 905, 913.